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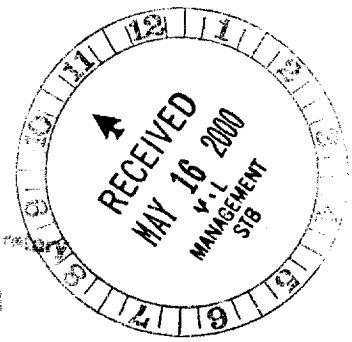
May 15, 2000



By UPS overnight mail

Surface Transportation Board
Office of the Secretary
Case Control Unit
Attn: STB Ex Parte No. 582 (Sub-No. 1)
1925 K Street, N.W.
Washington, DC 20423-0001

Re: STB Ex Parte No. 582 (Sub-No. 1), *Major Rail Consolidation Procedures*

Dear Mr. Secretary or Representative:

Enclosed please find an original and 25 copies of Comments, for filing with the Board in the above referenced matter.

Twenty-five copies accompany the original of this notice of intent to participate. Also enclosed is a 3.5-inch IBM-compatible floppy diskette (in Word Perfect 7.0 format), providing an electronic copy of these Comments.

Very truly yours,

Tom McFarland

Thomas F. McFarland, Jr.
Attorney for IMC Global Inc.

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cc: Bob Pence - Northbrook
Don Nunn - Bannockburn

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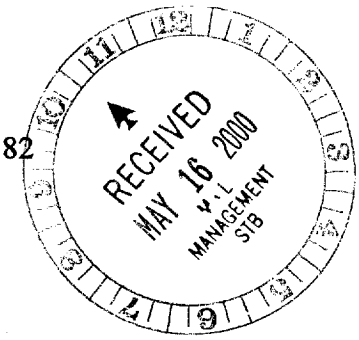
ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

MAJOR RAIL CONSOLIDATION PROCEDURES	)	EX PARTE NO. 582 (SUB-NO. 1)



COMMENTS

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Attorneys for Commentor

DUE DATE: May 16, 2000

BEFORE THE
SURFACE TRANSPORTATION BOARD

MAJOR RAIL CONSOLIDATION PROCEDURES	))	EX PARTE NO. 582 (SUB-NO. 1)

COMMENTS

Pursuant to the procedural decision in this proceeding served March 31, 2000, IMC GLOBAL INC. (IMC) hereby submits comments in response to the Board's Advance Notice of Proposed Rulemaking (ANPR) on modification of regulations governing proposals for major rail consolidations.

IDENTITY AND INTEREST OF COMMENTOR

IMC is one of the world's leading producers and suppliers of agricultural products and salt. With 1999 revenues and EBITDA of $2.4 billion and $659 million, respectively, IMC is among the world's largest producers and marketers of phosphate and potash crop nutrients, salt and animal feed ingredients. IMC is largely rail-dependent for transportation of its bulk products inasmuch as they move primarily in large volume over long distances, for which motor carrier transportation is not a feasible alternative. IMC makes extensive use of rail transportation. Its rail freight charges in 1999 were in excess of $280 million.

IMC has a strong interest in rail merger regulations that would preserve and enhance competition among rail carriers, and that would result in improved rail service. IMC has experienced a reduction of rail-to-rail competition as a result of major mergers of Class I rail carriers. Recently, IMC experienced very harmful service disruptions on the heels of acquisition of Conrail by CSXT and Norfolk Southern Corporation (NS). IMC has an interest in adoption of

regulations that are designed to avoid harmful cost increases and service deterioration that have resulted from recent mergers.

COMMENTS

IMC's comments are necessarily somewhat generalized inasmuch as no specific regulations have yet been proposed. However, IMC strongly believes that there are several principles that should guide the formulation of new regulations.

First, we believe that the regulations should provide for increased and aggressive use of rail line divestiture and trackage rights for non-merging rail carriers as means of preserving and enhancing rail competition in conjunction with proposed rail mergers. We take that position because research and experience indicate that the physical presence of a second rail carrier at origin or destination is necessary to achieve effective rail competition. Otherwise, rail duopolists simply do not effectively compete with each other.

IMC's experience tends to prove the point. For example, the Burlington Northern and Santa Fe Railway Company (BNSF) effectively competes with Union Pacific Railroad Company (UP) for traffic from an IMC potash production point in Utah that BNSF serves by means of trackage rights over UP secured as a condition to approval of UP's merger with Southern Pacific Transportation Company. In contrast, there is no effective rail competition at IMC's New Mexico potash facility that is served solely by BNSF. Our experience in this and other situations is that rail rates are more reasonable and rail service is more efficient when more than one rail carrier physically serves an origin or destination than when an origin or destination is captive to a single rail carrier.

Future rail mergers will create and strengthen increasingly-widespread duopolies in rail transportation markets in North America. Studies indicate that there is little or no rail-to-rail competition in duopoly markets. That has been the experience in Canada, in which a nationwide rail duopoly prevails. Consequently, unless competition is preserved and enhanced by line divestiture and/or trackage rights in merger cases, the harmful effects of absence of rail competition will continue and accelerate (i.e., constantly increasing rates and charges and indifferent service). That would be inimical to the public interest.

Another strong reason for increased use of divestiture and trackage rights as pro-competitive relief in merger cases is that the Board has very narrowly construed its authority to grant competitive access relief in non-merger settings. *See*, e.g., *Midtec Paper Corporation v. CNW, et al.*, 3 I.C.C.2d 171 (1986). In addition, there are no provisions in United States law for other forms of relief for anticompetitive action, such as regulated interswitching, extended interswitching and competitive line rates, which exist in Canada. However, the Board's authority to grant divestiture and trackage rights relief in a merger setting is explicit in 49 U.S.C. § 11324(c), *viz.*:

> . . . The Board may impose conditions governing the transactions, including the divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities. Any trackage rights and related conditions imposed to alleviate anti-competitive effects of the transaction shall provide for operating terms and compensation levels to ensure that such effects are alleviated . . .

This state of affairs, where authority to impose conditions for competitive access is clear in a merger context but not thought to be clear in other settings, strongly suggests that aggressive steps be taken to enhance rail competition in merger proceedings.

Secondly, the regulations must recognize that rail service is required to improve as a result of a merger, not stay the same or worsen. It is not enough to protect against serious service disruptions that have occurred in recent mergers. Mergers are supposed to have service benefits. Consequently, there is need for performance measures by which pre-merger and post-merger service can be compared. In addition, there should be a showing required of the manner and extent to which rail service will be improved as a result of a proposed merger, with a meaningful and enforceable penalty if the predicted service improvement does not occur. Otherwise, the shipping public will continued to be faced with post-merger rail service that falls far short of applicants' promises at best, or which involves serious service declines at worst.

In addition, we offer the following brief comments on particular subject matter referred to in the ANPR.

Downstream Effects

IMC strongly favors a regulation that takes into account the probable downstream effects of proposed rail mergers.

Maintaining Safe Operations

IMC supports the concept of Safety Integration Plans (SIP) throughout the implementation process of approved rail mergers. Although IMC agrees that this proceeding need not further address the SIP process, we express concern over the extensive track safety violations recently publicized in regard to CSXT. We fear that such may have been a result of the merger process in that CSXT may well have cut back on track maintenance as a result of paying much more than fair value for its share of Conrail. That suggests that the merger regulations ought to take into account what might happen if a bidding war results in payment of more than

fair value for rail property (e.g., guarantees against reducing track maintenance, guarantees against raising shippers' rates, etc.).

Safeguarding Rail Service

Our comments on this subject appear above as one of two priority positions for IMC. We emphasize that mechanisms must be identified to measure post-merger rail service so that merger applicants can be held to their promise of improved service, with meaningful penalties if they fail to perform. Applicants benefit substantially from rail mergers. The quid pro quo for the shipping public must be improved rail service. The serious service declines following recent mergers are clearly unacceptable, but so is a continuation of indifferent pre-merger rail service after applicants have solicited shipper support by promising dramatic service improvements.

Promoting and Enhancing Competition

IMC strongly agrees that the time has come for the Board to place greater emphasis in rail merger proceedings on enhancing rail competition. Our general comments on that subject appear above as one of two priority positions for IMC. We favor increased and aggressive use of divestiture and trackage rights to enhance rail competition in merger settings.

We offer the following additional comments on the competition-enhancing measures mentioned in the ANPR:

(1) **Shared Asset Areas** - IMC strongly favors this concept. One of the most effective means of ensuring fair and effective rail competition in terminal areas is by means of a neutral switching carrier jointly owned by the competitors. *See*, e.g., *Illinois Central R. Co. Construction and Trackage*, 307 I.C.C. 493 (1959) at 529, quoting from *Consolidation of Railroads*, 159 I.C.C. 522 ("All terminal properties should be thrown

open to all users on fair and equal terms so that every industry on whatever rails shall have access to all lines radiating from that terminal, and every line haul carrier reaching that terminal shall similarly have access to all terminal tracks within the terminal area").

(2) **Maintaining Open Gateways** - IMC also strongly favors this pro-competitive mechanism. The regulations should ensure that gateways remain open on a long-term basis, i.e., after expiration of rail contracts existing at the time of the merger.

(3) **Switching Within or Adjacent to Terminal Areas** - in our opinion, this does not go far enough. We favor divestiture or major trackage rights, such as were provided for BNSF over UP's Central Corridor route in the UP-SP merger, as essential to enhance competition.

(4) **Contracts for Bottleneck Routes** - again we believe that this does not go far enough. We believe that it is essential to provide for the physical presence of a second major rail carrier to the maximum extent possible in order to ensure that there will be effective rail intramodal competition.

(5) **New Through Routes At Reasonable Interchange Points** - see comments on Nos. 3 and 4 above.

(6) **The One-Lump Theory** - IMC strongly favors elimination of this concept and maximum use of conditions to provide for the presence of a second rail carrier at exclusively-served origin or destination points.

Shortline and Regional Railroad Issues

As a general proposition, IMC favors treatment of shortline and regional railroads in rail merger cases in a manner that enhances their ability to provide competitive rail service for shippers.

Employee Issues

IMC does not have specific comment on this subject matter.

Three to Two Issues

IMC believes that merger regulations should require replacement of lost rail competition when a merger otherwise would result in a reduction from three to two rail competitors.

Merger-Related Public Interest Benefits

As indicated above, IMC is strongly of the view that merger applicants should be held to their promise of improved rail service. Post-merger monitoring of rail service should be conducted. Meaningful and easily enforceable penalties should be provided for failure of performance.

Cross-Border Issues

IMC defers comment on this subject matter pending review of comments to be submitted by agencies of the United States Government.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, these comments should be taken into account by the Board in proposing regulations applicable to consolidations involving major rail carriers.

Respectfully submitted,

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(312) 236-0204

Attorneys for Commentor

DUE DATE: May 16, 2000

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2000, I served the foregoing document, Comments, by first-class, U.S. mail, postage prepaid, on all parties of record appearing in the Board's official service list.

Thomas F. McFarland, Jr.

Thomas F. McFarland, Jr.